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No. 73-1011

In the Supreme Court of the United States

OCTOBER TERM, 1973

DATRONICS ENGINEERS, INC., PETITIONER
v.
SECURITIES AND EXCHANGE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE SECURITIES AND EXCHANGE COMMISSION IN OPPOSITION

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OPINIONS BELOW

The opinions of the court of appeals (Pet. App. 21a, 29a) are not yet reported. The oral opinion of the district court (Pet. App. 1a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on July 27, 1973. A timely petition for rehearing was granted in part and the judgment was modified on September 28, 1973. The petition for a writ of certiorari was filed on December 27, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a corporation's "spin-off" distributions to its shareholders of the stock of various privately-held companies were subject to the registration provisions of the Securities Act of 1933, where the purpose and effect of the spin-offs was to convert these privately-held companies into publicly-held companies and to create public trading in the spun-off stock through resales of that stock into the over-the-counter securities market by the corporation's shareholders.

STATUTES INVOLVED

The provisions of Sections 2(3), 2(11), 5 and 17(a) of the Securities Act of 1933, as amended, 15 U.S.C. 77b(3), 77b(11), 77e and 77q(a), and of Section 10(b) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. 240.10b-5, are set forth at Pet. App. 31a-35a.

STATEMENT

1. The evidence, as set forth in the opinion of the court of appeals (Pet. App. 23a-24a), established that from November, 1968 through December, 1969, petitioner engaged in a series of spin-off distributions[1] to its shareholders of unregistered stock of nine privately-held companies. The purpose and effect of each of these distributions was to convert the privately-held companies into publicly-held companies and to create

[1] The term "spin-off" refers to a corporation's distribution to its shareholders of the stock of another company, usually a subsidiary.

a public market for the stock through trading in the over-the-counter securities market.

The spin-offs occurred pursuant to two general patterns. Six of the spin-offs involved similar agreements with principals of privately-held businesses having difficulty securing financing from conventional sources. In each case the privately-held business was merged into a new corporation organized by petitioner. The new corporation then issued stock to both petitioner [2] and the principals of the merged private business. Petitioner then distributed a part of the shares issued to it to its shareholders.

Three of the spin-offs involved wholly-owned subsidiaries of petitioner. Two subsidiaries, created pursuant to arrangements to spin-off their shares, issued stock to petitioner in exchange for either a nominal cash payment or for "management services" and petitioner then distributed part of these shares to its stockholders. The third subsidiary had been organized a year and a half prior to the spin-off of its shares.

Upon execution of the spin-off agreements or arrangements, officers and agents of petitioner began private placements of stock of the spin-off companies as a means of obtaining financing for those companies. Investors were persuaded to purchase this stock on the

[2] The consideration given by petitioner in acquiring shares of the new corporations consisted of either a nominal cash payment or "management services" in organizing the new corporation and implementing the spin-off. In addition, certain of petitioner's officers and agents, and petitioner's legal counsel, received shares in exchange for nominal cash payments or the rendering of services (Pet. App. 4a–5a, 25a).

basis of representations concerning the public markets expected to develop from the spin-offs (Pet. App. 4a, 5a).

In each case the spin-off resulted in the creation of a publicly-held company with approximately 1,000 shareholders and public trading promptly developed in the over-the-counter market. These events occurred without the availability of the kind of information which would have been provided by registration under the Securities Act of 1933. Indeed, petitioner disseminated information to shareholders which contained false and misleading information concerning the spin-off companies and the reasons for the spin-off distributions (Pet. App. 25a, 26a).[3]

The creation of a public market without the provision of accurate accompanying information to investors resulted in volatile price movements in the stock (Court of Appeals App., pp. 184–192). As the court of appeals found, both the stock "disseminated and that kept by Datronics, did appreciate substantially after the distributions" (Pet. App. 25a).

2. The Commission brought an enforcement action against petitioner and others to enjoin further violations of the registration and anti-fraud provisions of the federal securities acts. The district court denied the Commission's motion for preliminary injunction, and granted summary judgment in favor of petitioner

[3] For example, shareholders were falsely informed that the spin-offs were implemented because of the "impracticality" of operating the spin-off companies (Pet. App. 26a). Since petitioner's obligation to spin-off shares was incurred as part of the mergers, the spin-offs were not based on an abandonment of an original intention to operate the companies.

and all other defendants who had not consented to a permanent injunction, on the ground that the spin-offs did not involve a "sale" within the meaning of Section 2(3) of the Securities Act of 1933.

The court of appeals reversed, vacated the judgment of the district court, and remanded for entry of a preliminary injunction (Pet. App. 23a, 28a). On rehearing, in light of petitioner's additional representation as to the prospects of a proposed merger, the court of appeals modified that part of its order which required an injunction against petitioner, authorizing the district court on remand to consider petitioner's representation in determining whether petitioner should be preliminarily enjoined (Pet. App. 30a).

The court of appeals held that the spin-offs constituted "sales" of securities required to be registered under Section 5 of the Securities Act. The court rejected petitioner's contention, and the district court's conclusion, that the spin-offs did not constitute "sales" because the distributions were not "for value" within the meaning of Section 2(3) of the Act. It held that value accrued to petitioner and its officers and agents as a result of the development of public trading markets in the spun-off shares, in that the price of the shares appreciated substantially after the distributions and thus provided an added increment of value both to the stock retained by petitioner and to the stock held by its officers and agents (Pet. App. 25a).[4]

[4] Although petitioner (Pet. 10–11) aptly describes the court of appeals' decision as holding that the spin-offs here involved were "sales," it further states (Pet. 11, n. 8) that "Judge Widener concurred 'with so much of the opinion as holds that Datronics

The court also ruled that in acquiring stock from the spin-off companies and distributing it to its shareholders, petitioner was an "underwriter" within the meaning of Section 2(11) of the Act, which defines an "underwriter" as "any person who has purchased from an issuer with a view to * * * the distribution of any security." Petitioner was therefore not entitled to the exemption from registration under Section 4(1) of the Act for "transactions by any person other than an issuer, underwriter or dealer" (Pet. App. 25a–26a).[5] Finally, the court found that the misleading statements made by petitioner were made "in connection with the purchase or sale" of a security and thus in violation of the anti-fraud provisions of the federal securities laws.

ARGUMENT

The decision of the court of appeals is correct, and the petition presents no question warranting review by this Court.

1. The court of appeals correctly held that the series of nine spin-offs, which had the purpose and effect of converting nine privately-held companies into

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may be an underwriter within the meaning of the statute,'" thereby erroneously suggesting that the concurring judge did not agree that the spin-offs involved a sale. The concurring opinion concluded, however, that the "value requirement of a sale * * * may be satisfied by the exchange of stock of the various companies with Datronics or by the exchange of stock of the various companies for services of Datronics" and that "the issuer [each of the spin-off companies] * * * did receive value * * *" (Pet. App. 29a).

[5] The court also concluded that no exemption from registration was available for the spin-offs since petitioner was also an issuer, or at least a co-issuer (Pet. App. 24a).

publicly-held companies and of creating trading markets in the stock of these spin-off companies, were subject to the registration requirements of the Securities Act of 1933. Contrary to petitioner's contention (Pet. 12–15), this holding is consistent with both the language and the legislative purpose of the Act.

a. Throughout the petition, petitioner erroneously characterizes the spin-offs as "stock dividends" (Pet. 2, 7, 8, 9, 10, 11, 12, 15, 19, 20), a term which is generally recognized as referring not to the situation involved here—a distribution by a corporation of stock of another company—but rather to a dividend in a corporation's own stock.[6] A stock dividend is a transaction which, by its very nature, cannot have the effect of converting a privately-held company into a publicly-held company. A stock dividend does not increase the number of shareholders; the company's existing shareholders merely receive more shares of the same company. For this reason, a stock dividend has been described as being "really nothing more than a process in corporation bookkeeping."[7]

Because of this erroneous characterization of spin-offs as stock dividends, and the concomitant failure of petitioner to recognize the distinction between its spin-offs and a dividend in a corporation's own stock, petitioner mistakenly concludes that the present spin-offs

[6] Black's *Law Dictionary* 565 (rev. 4th ed. 1968); 11 Fletcher *Cyclopedia of the Law of Private Corporations*, § 5359 (1971 Rev. Vol.); *City Bank Farmers' Trust Co.* v. *Ernst*, 263 N.Y. 342, 189 N.E. 241, 242. See also the district court's opinion in the present case (Pet. App. 7a).

[7] Black's *Law Dictionary*, *supra*, at 565; Fletcher, *Cyclopedia of the Law of Private Corporations*, *supra*, at § 5362.

are the type of transaction which "Congress deliberately intended not to regulate" (Pet. 13). But the type of transaction referred to in the legislative history upon which petitioner relies was that of a dividend in a corporation's own stock. See H. Rep. No. 152, 73d Cong., 1st Sess. 25 (1933); H. Rep. No. 85, 73d Cong., 1st Sess. 16 (1933). Congress exhibited no desire to exclude from the Act's coverage the type of transaction involved here, where a distribution is effected for the purpose of converting a privately-held company into a publicly-held company and of creating a trading market in the company's shares. Indeed, the Act and its legislative history show that Congress affirmatively intended that, absent the full disclosure afforded by compliance with the registration provisions, transactions of the present type, including the sales into the public market, would be prohibited.

The spin-off transactions implemented by petitioner, creating publicly-held corporations and public trading in the spin-off shares, are precisely the kind of transactions which Congress intended to be subject to registration under the Securities Act of 1933. Section 5 of the Act makes it unlawful for any person through the use of the mails or interstate facilities directly or indirectly to offer or sell unregistered securities. The registration requirement is a "prima facie requirement that every security and transaction not specifically exempted * * * should be kept within its scope." H. Rep. No. 85, *supra*, at 6–7.

Under the Act, registration applies to transactions rather than companies; thus, registration is required

even for offerings of securities by companies already having publicly traded shares. However, the protection afforded by registration is most necessary in the case of initial public offerings of securities of private or closely held companies, because there is usually little or no information available to the public about the company. Registration provides the financial community and the public which it serves with information essential to the maintenance of a trading market in which investors can buy and sell the company's stock on the basis of informed investment judgments and at prices that are not determined arbitrarily. As a commentator on the federal securities laws has written, the Act is of importance:

> * * * in helping to assure that securities of new or closely held companies may not reach "public" hands for the first time without undergoing the responsible disclosure process of federal law.

Cohen, *"Truth in Securities" Revisited,* 79 Harv. L. Rev. 1340, 1395 (1966).

Congress emphasized the need for public disclosure accompanying issues of new securities and new offerings (See H. Rep. No. 85, *supra,* at 3, 5); accordingly, the exemption provisions of Section 4 of the Act apply essentially to trading transactions occurring *after* a market has been created. As the House Report noted, the type of transaction exempted is one which is "not connected by time or circumstance with distribution of a new offering" (*id.* at 6), and in general is the type of transaction "where there is no practical

need for [the bill's] application or where the public benefits are too remote" (*id.* at 5).

The spin-offs in this case do not fall within the exemption under Section 4(1) of the Act.[8] As the court of appeals found, petitioner was an issuer or co-issuer or an underwriter within the meaning of the Act; thus the exemption for sales by persons not issuers or underwriters is not applicable.

b. Petitioner contends that while it may be desirable to subject spin-off distributions to registration, Congress had not done so. As noted earlier (pp. 7–8, *supra*), the legislative history relied on by petitioner relates to dividends by a corporation in its own stock rather than to spin-offs. Thus, petitioner's contention rests on its construction of Section 2(3) of the Act, which provides in relevant part:

> The term "sale" or "sell" shall include every * * * disposition of a security or interest in a security, for value.

Petitioner argues that "for value" requires bargained-for consideration given by the buyer to the seller of the securities, and that since petitioner's shareholders did not give consideration for the shares

[8] The terms of an exemption from the Act are construed strictly and the person claiming the benefit of an exemption has the burden of establishing his entitlement. See *Securities and Exchange Commission* v. *Ralston Purina Co.*, 346 U.S. 119, 126; *Securities and Exchange Commission* v. *Continental Tobacco Co.*, 463 F. 2d 137, 155–156 (C.A. 5); *Quinn and Company* v. *Securities and Exchange Commission*, 452 F. 2d 943, 945–946 (C.A. 10) certiorari denied, 406 U.S. 957; *Chapman* v. *Dunn*, 414 F. 2d 153, 159 (C.A. 6); *United States* v. *Custer Channel Wing Corp.*, 376 F. 2d 675, 678 (C.A. 4), certiorari denied, 389 U.S. 850; *Capital Funds, Inc.* v. *Securities and Exchange Commission*, 348 F. 2d 582, 586 (C.A. 8).

received by them, no "sale" occurred within the meaning of the Act.

Contrary to petitioner's assertions, the definitions in the federal securities laws "are not limited to transactions ordinarily governed by the commercial law of sales" (*Dasho* v. *Susquehanna Corp.*, 380 F. 2d 262, 266 (C.A. 7), certiorari denied *sub nom. Bard* v. *Dasho*, 389 U.S. 977), and the court of appeals correctly held that value accrued to petitioner and its officers and agents as a result of the development of public trading in the spun-off stock.

The court's holding is consistent with this Court's admonition that the securities laws are to be construed "not technically and restrictively, but flexibly to effectuate * * * [their] remedial purposes." *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195; accord, *Superintendent of Insurance* v. *Bankers Life and Casualty Co.*, 404 U.S. 6, 12; *Tcherepnin* v. *Knight*, 389 U.S. 332, 336. The court's decision is also in accord with *Securities and Exchange Commission* v. *Harwyn Industries Corp.*, 326 F. Supp. 943 (S.D.N.Y.) which involved spin-offs similar to those carried out by petitioner.

Moreover, regardless of whether the spin-offs themselves were sales, petitioner and the spin-off companies were, in a very real sense, participants in the subsequent sales of the spun-off stock by petitioner's shareholders into the market. Since the spin-off companies and petitioner, by issuing and spinning off the shares, intended, were responsible for, and derived benefits from the creation of the trading markets, it is reasonable to view them as being participants in the shareholders' sales through which the spun-off shares en-

tered and created the markets. Section 5 expressly applies not only to persons who engage in the proscribed conduct "directly" but also to those who do so "indirectly." Petitioner could not itself have lawfully engaged in unregistered sales directly into the market, and the statute does not permit petitioner to circumvent the registration requirements through indirection.[9]

2. Petitioner also contends that an injunction operates as a punishment and in this case has the effect of an *ex post facto* device because the court's holding is contrary to the Commission's prior position on spin-offs. No injunction has yet been entered against petitioner, however, since the court of appeals has left the question of injunctive relief to be considered by the dis-

[9] We have discussed only the applicability of the registration provisions and not that of the anti-fraud provisions. If, as the court of appeals held, petitioner's activities involved sales that required registration, those sales also support the fraud aspect of the case. But, even if petitioner's activities did not involve a sale sufficient to require registration, petitioner's fraudulent conduct was, under well-established principles, violative of the anti-fraud provisions, in that the false and misleading statements were reasonably likely to influence the decisions of investors to buy and sell the securities of the spin-off companies in the markets created by the spin-offs. See *Securities and Exchange Commission* v. *Texas Gulf Sulphur Co.*, 401 F. 2d 833, 858–861 (C.A. 2) (*en banc*), certiorari denied *sub nom. Coates* v. *Securities and Exchange Commission*, 394 U.S. 976; *Securities and Exchange Commission* v. *International Chemical Development Corp.*, 469 F. 2d 20, 27 n. 3 (C.A. 10); *Mitchell* v. *Texas Gulf Sulphur Co.*, 446 F. 2d 90, 100–102 (C.A. 10), certiorari denied, 404 U.S. 1004; *Securities and Exchange Commission* v. *North American Research and Development Corp.*, 424 F. 2d 63, 78–79 (C.A. 2); *Securities and Exchange Commission* v. *Great American Industries, Inc.*, 407 F. 2d 453, 455 (C.A. 2) (*en banc*), certiorari denied, 395 U.S. 920; *Heit* v. *Weitzen*, 402 F. 2d 909, 912–914 (C.A. 2), certiorari denied, 395 U.S. 903.

trict court on remand in light of petitioner's representations concerning a proposed merger (see Pet. App. 29a–30a). Second, even if an injunction will be entered against petitioner, an injunction against future violations of the federal securities laws is a "mild prophylactic." *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc., supra,* 375 U.S. at 193.

In any event, the court of appeals properly rejected petitioner's contention, stating (Pet. App. 27a–28a) that it could not read the Commission's prior releases as:

> evincing express or implied approval of the repeated and large-scale violations as are here. The releases do not approve or condone a campaign, such as Datronics engaged in, to develop means and opportunities to promote spin-offs. Indeed, one of Datronics' agents was a "finder" of opportunities for spin-offs.

In support of its claimed reliance on a long-standing Commission position relating to spin-offs, petitioner refers to Securities Act Release No. 929, 11 Fed. Reg. 10958 (1936), and to a 1962 Training Manual of the Commission's New York Regional Office. But Release No. 929 was directed toward stock dividends, not spin-offs. See *Securities and Exchange Commission* v. *Harwyn Industries Corp., supra,* 326 F. Supp. at 955–956. Moreover, even if Release No. 929 were construed as covering both stock dividends and spin-offs, neither that release nor the New York Regional Office Training Manual [10] can be regarded as dealing with the type of

[10] Contrary to petitioner's assertion (Pet. 6, 16), the training manual was not an expression of views by the Commission itself. It was a training guide prepared in a regional office.

spin-off involved here—*i.e.*, a spin-off effected for the purpose of creating a trading market. This type of spin-off is a relatively recent phenomenon, having developed in the past few years.[11] The 1936 release and the 1962 training manual were simply not focusing on and did not contemplate a type of spin-off which was not then a problem and indeed was not even in existence.

Moreover, petitioner's claim that it acted in reliance upon the training manual is without support in the record. Petitioner has presented no proof that it even knew of the existence of the training manual, a document which, contrary to petitioner's assertion (Pet. 6, 16), was a non-public, internal training tool labeled "For Staff use only" (see Court of Appeals App., pp. 242–244).

3. Petitioner urges that review by this Court is warranted because the judgment of the court of appeals may have collateral estoppel effect in private damage actions brought against petitioner and its shareholders. The asserted collateral estoppel effect of a judgment is not in itself sufficient to warrant review by this Court, and in any event, the collateral estoppel effect of a judgment in a Commission injunctive action in subsequent private damage actions is unclear. See *Rachal* v. *Hill*, 435 F. 2d 59 (C.A. 5), certiorari denied, 403 U.S. 904.

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[11] See *How Stocks Debut at the Back Door*, Business Week, March 29, 1969, pp. 123–126; Shapiro and Katz, *The "Going Public Through the Back Door" Phenomenon—An Assessment*, 29 Md. L. Rev. 320, 342 (1969).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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END OF CASE

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